

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

NO. 5:08-CR-384-FL  
NO. 5:12-CV-141-FL

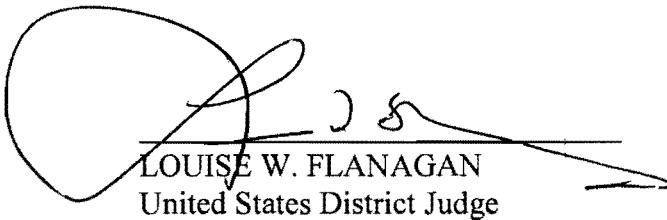
ERIC KELSEY JOHNSON, )  
Petitioner, )  
v. ) ORDER  
UNITED STATES OF AMERICA, )  
Respondent. )

This matter comes before the court on petitioner's motion pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct sentence (DE # 26). On April 16, 2012, the government filed an answer in opposition to the motion, arguing that the petition was untimely filed and that petitioner in plea agreement waived his right to collaterally attack his conviction. However, on September 5, 2012, the government filed notice of withdrawal of its answer and waived its previously asserted defenses. The government suggests that the court reach the merits of the § 2255 petition and vacate petitioner's conviction.

On April 8, 2009, petitioner pled guilty, pursuant to a written plea agreement, to felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924. The court sentenced petitioner on July 9, 2009, to a term of 71 months' imprisonment, followed by a three-year term of supervised release. In light of United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc), petitioner does not have a prior conviction of a crime punishable by imprisonment for a term exceeding one year. A necessary element of the crime of conviction is therefore lacking. See 18 U.S.C. § 922(g)(1). Where the government waives defenses previously asserted in motion to dismiss

and concedes that petitioner's motion to vacate sentence should be granted, and where the court, having reviewed the record, finds petitioner's motion meritorious, said motion is GRANTED, and the judgment of conviction and sentence dated July 9, 2009, is VACATED. Petitioner is ORDERED to be released from federal custody, subject to pending detainers, if any, unless some cause be shown by the government on or before noon on September 7, 2012, why petitioner is not now entitled to this relief.

SO ORDERED, this the 6th day of September, 2012.



LOUISE W. FLANAGAN  
United States District Judge